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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 776

DWIGHT D. CLARKE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioner, DWIGHT D. CLARKE, respectfully shows to this Honorable Court that this is a Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit, to review a decision made and entered by that Court on the 30th day of December, 1942, rehearing denied on the 6th day of February, 1943, affirming a judgment of conviction in the United States District Court for the Western District of Washington, Northern Division:

134626

A.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The grand jury of the United States of America for the Western District of Washington, Northern Division, returned an indictment of four counts charging the petitioner and one Tom Drummey with having used the United States mails in order to carry out a scheme to defraud, in violation of Sec. 338, Title 18 U. S. C. A. (R. 2.) Both defendants were convicted on all four counts. (R. 19.) The conviction was affirmed on December 30th, 1942, the case at the present date being unreported. (R. 531.)

The pertinent portions of the statute involved are as follows, Sec. 338 of Title 18 U. S. C. A.:

> "Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * *shall for the purpose of executing such scheme or artifice* * * * or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circulars, pamphlets, or advertisements in any post-office or station thereof or street or other letter-box of the United States, or authorized depositary for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom." (Italics ours.)

The charging part of the indictment, as set out in

Count One, and incorporated by reference in all the other counts, describing the scheme is:

> "That heretofore and prior to the several acts of using the United States mails hereinafter set forth, the defendants together with one Lester Main, now deceased, had devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises * * * and the said defendants, and each of them, so having devised and intending to devise the scheme and artifice aforesaid, *for the purpose of executing the same,* and attempting so to do * * * did knowingly, wilfully, unlawfully and feloniously cause to be placed in the United States Post Office, etc. * * *" (Italics ours.) (R. 2, 5.)

The indictment alleged and proof was adduced to show that the defendants, together with one Lester Main, then deceased, devised a plan and scheme to obtain from one victim, a Mrs. Jean Hunter, large blocks of valuable Coca Cola stock by means of false and fraudulent representations. In exchange for such stock she was to receive first shares in a worthless concern known as Main Laboratories (owned principally by Lester Main), and thereafter in the Seattle Loan & Discount Company, of which the defendant Drummey was president. The mailing, under which the trial court secured or assumed jurisdiction, in the first count, was the mailing by the brokerage firm of E. A. Pierce & Co. of Seattle, Washington, of certain Coca Cola stocks to their home office in New York City.

Count two charges a similar mailing of similar stocks by the same company to their home office in New York City. The third count sets out a letter from the defendant Tom Drummey acting in his capacity as president of the Seattle Loan & Discount Company and written at the direction of the Board of Directors of that company. This letter was addressed to the defendant, Dwight D. Clarke. The fourth count sets out a letter written by the defendant Drummey to Mrs. Jean M. Hunter, in response to an inquiry from her, detailing the transactions she had had with the Seattle Loan & Discount Company.

There is no evidence of any kind tending to show that the petitioner, DWIGHT D. CLARKE, personally mailed or caused to be mailed any of the letters described in the indictment.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The decision of the Circuit Court of Appeals in approving and upholding the trial court's instruction set out below is:

1. Untenable and in conflict with the weight of authority;

2. Passes upon an important question of Federal Law which has not been but which should be settled by this court;

3. Departs so far from the usually accepted course of judicial proceedings as to call for the Supreme Court's jurisdiction.

4. Amends and modifies the Postal Fraud Statute and substitutes one of its own making, changing and lowering the standard of guilt.

THE INSTRUCTION.

"The jury is further instructed that if they are convinced beyond a reasonable doubt from the evidence that the defendants or either of them, did devise a scheme or artifice or joined in a scheme or artifice to defraud Mrs. Hunter and did use or cause the mails to be used *in connection therewith,* that it is the duty of the jury in such event to find such defendant or defendants, guilty of such count or counts, regardless of whether the jury might believe that Mrs. Hunter agreed to sell her Coca Cola stock to Mr. Drummey at 10% below the market on the sale date or agreed to sell through him as a broker, as in neither event would anyone have a right to defraud Mrs. Hunter." (Italics ours.)

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the

case numbered and entitled on its docket No. 9914, DWIGHT D. CLARKE, the Petitioner, v. United States of America, Respondent, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals for the Ninth Circuit be reversed by the court, and for such further relief as to this court may seem proper.

JOHN F. GARVIN,
ANTHONY SAVAGE,
H. SYLVESTER GARVIN,
Attorneys for Petitioner.

Dated February 27, 1943.